Central Law Journal.

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NOTICE.

There has been difficulty in getting the Journal out on time the last two weeks, due to the general strike in the printing trade. We are doing our best to have the Journal mailed out on Wednesday, as usual, and ask our subscribers to be patient.

JUDICIAL PREJUDICE AND BIAS.

In our issue of April 15th (92 Cent. L. J. 261) we discussed the Berger decision relating to the effect to be given to "affidavits of prejudice" in federal courts. We there criticised the law which as construed by the Court permitted a litigant to allege "facts" in an affidavit of prejudice and gave no opportunity to the judge to controvert the facts so set forth. In that editorial we had in mind solely the interests of the judge who is subjected, as we believe, to unnecessary embarrassment, by the requirement that the affidavit shall set forth the "facts." This portion of the law should be repealed or modified. On the other hand, we believe, that looking at this decision from the standpoint of the interests of the public, it could not, and should not, have been otherwise than it was. We wish to offer a few reasons for this belief.

It is very seldom that a judge will want to sit in a case in which he knowingly does not possess the confidence of Counsel trying it, not to speak of the litigants, whatever may be the reason. Yet there should be ample protection against the rare exceptions to the rule. The recent interpretation of Section 23 of the Judicial Code would appear to go along way towards that end. Bias and prejudice are obviously secret and often inarticulate and sometimes unconscious in their deadly work, hence "it cannot be the assumption of Section 23 that the bias or prejudice of a judge in a particular case would be known by everybody. * * *" Therefore "the tribunals of the country shall not only be impartial in the controversies submitted to them, *but shall give assurance that they are impartial* —free * * * from any bias or prejudice that might disturb the normal course of impartial judgment."

It will be observed that the above quotations were taken from the "Berger Case" (Berger v. U. S. 8 U. S. Sup. Ct. Ad. Op., p. 277, 1920-21) in which Section 23 of the Judicial Code was interpreted and applied. Said the Court: "To commit to the judge a decision upon the truth of the facts (set forth in the affidavit required by Section 23) gives chance for the evil against which the section is directed." This sentiment gives firm support to the views just ventured that a biased or prejudiced person is often unconscious of the fact, wherein no dishonesty of purpose is present. It is a mental condition of personal hostility or dislike on one hand or a favoritism inspired by sentiment or gratitude or other passion, on the other hand. These tendencies enter too deeply into human nature to permit of analysis and application.

Sometimes it is a mere opinion or belief of the party or counsel but, said the Supreme Court, "both are of influence and universally regarded as of influence in the affairs of men and determination of their conduct and it is not strange that Section 23 so regards them." And, said the Court, "to refuse their application to Section 23 would be arbitrary and make its remedy unavailable in many, if not in most cases." The lawyer ascends the bench with the full and honest intention of putting behind him the passions of politics, social bitterness and professional enmities incurred in hard fought legal battles but his humanity is like the leopard's spots, its coloring cannot be changed. Or like Æsop's fable of the nails driven into the post to mark bad conduct, their removal for good conduct still left the holes. A judge, for the sake of his own reputation and the repute of the Courts should hesitate long in trying the case of

a man who "believes" he has acted unfairly or arbitrarily in some named transaction, however honest the judge may "believe" himself to have been. His obstinacy is too great an imposition on patriotism.

But the "Berger" decision will prove helpful in combatting the unreasoning effort to defeat life tenure for federal judges, which is often thought to place the judge beyond the reach of the ordinary citizen, or even the lawyer. The knowledge that a prejudiced judge or one biased in favor of a party can be removed from the case by the simple filing of an affidavit based upon "definite incident and its time and place," will go far towards popularizing and establishing confidence in life tenure for, whatever may be said of it, life tenure has the countervailing advantages of helping to establish independence—that most essential element upon the bench.

And these things that we have been considering are not so much legal, as human elements. That is why they so often engender passion instead of reason. That also supplies the reason for the timely intervention of third parties or for enjoining the judge "from proceeding further." Any prediction of results that does not take humanity into consideration is worthless. Therefore there is no rule by which human conduct may be certainly gauged. We conclude that one finds the greatest safety in the negative. That is the king pin of Section 23 of the Judicial Code. The litigant is not left to the mercy of the conjecture of what a human being believes he can do, or may do, but to the certainty of what the man has done. Past conduct is a measurably safe index to future performance; all else is promise—mere words. If one maltreat me, I shall in my heart continue to suspect him whatever his reformation, or solemn protestation. The "belief" that he has done so will work the same result.

So, it is gratifying that the opinion of the Supreme Court interpreted some basic common sense into Section 23 of the Judicial Code and incidentally made of it a new argument for life tenure. And this is necessary. Contrary to the recommendations of the Bar, some purely political judges will occasionally ascend the bench. Sometimes their bias is notorious to the extent of establishing what Mr. Taft designated "judicial families." Sometimes their prejudice against individuals is apparent to the Bar if not to the community. Sometimes they are more adroit. But the people are never deceived. It is these rare exceptions for which the rule was provided. Judges are always on trial before the bar of public opinion. Their origin, antecedents and manner of election are never forgotten and are freely discussed. It is strange, but it is true, that the best measure of a judicial reputation for proper deportment, impartiality and justness may be had at the corner grocery or the club, just as the judge's real fitness and preparation to be a judge may be had only from the bar.

The judicial ermine is the greatest of honors. It is one of the most sacred. The judge and the preacher rank close together in the hearts of men. God sent judges to govern the people at one time on the world's history. In most instances they occupy first place in the hearts of the people, today. Always in such instances the man, as well as the officer, measures up to the high honor. Sometimes he does not do so in origin, deportment or judicial calibre or in the manner of his selection. Then arises a feeling that there may be personal obligations to be met, a social position to be acquired or political demands to be paid. There is no escape from it in life nor in death, for justice is the greatest interest of man on earth and the Judge's record follows his person and his memory as persistently as a shadow. In such cases a patriotic people respect the office, but not the man, and feel that they should watch the man. For such possible isolated instances was Section 23 provided by Congress. But these isolated cases may do a great deal of harm to faith, submission and respect. In such cases therefore the section should be freely used, that an

unfortunate public may not despair or rebel and criticize the whole of jurisprudence on account of the exception to the rule.

We sympathize with the virtuous judges who must submit to possible misconstruction of the "uncontrovertible" facts alleged in such affidavits, but until Congress sees fit to correct this injustice, the judge must submit with sacrificial resignation in order that the full merit of the law may be administered and public confidence in the judiciary promoted.

T. W. SHELTON.

NOTES OF IMPORTANT DECISIONS

THE "ENDEAVOR" TO COMMIT A CRIME IS NOT AN "ATTEMPT" TO COMMIT A CRIME.—Words by long continued usage in the law become loaded down with such fine distinctions that it is often dangerous to use them in the colloquial sense. Legislators, therefore, should be encouraged to emulate Congress in choosing new and legally undefined words to describe a new offense. This point is well illustrated in the recent case of United States v. Russell, 41 Sup. Ct., 260, where the Court held that the use of the word "endeavor" in Criminal Code § 135, making it punishable to "endeavor" to influence a petit juror, avoids the technical difficulties which would have been involved in the use of the word "attempt," and that defendant, who visited the wife of a juror and conveyed to her an intimation that the juror would be paid for returning a verdict favorable to one accused of an offense, was guilty of the endeavor, though his acts had not progressed far enough to amount to an attempt to influence the juror, since, under the section, it is the endeavor that is punished, and not its success.

The defendant was indicted for an endeavor to bribe a juror selected to try the case of William D. Haywood. The Government charged that defendant approached the juror's wife for the purpose of seeing whether he was favorable to Haywood or susceptible to a bribe. He made the statement to the juror's wife that he did "not want to pay money to any of the petit jurors sitting at the trial of said case unless they knew such petit jurors would favor their acquittal." Defendant's counsel contended that this did not constitute an "attempt but a mere 'preparation'" for an attempt. To this argument the Supreme Court replied:

"We think, however, that neither the contention nor the cases are pertinent to the section under review and upon which the indictment was based. The word of the section is "endeavor," and by using it the section got rid of the technicalities which might be urged as besetting the word "attempt," and it describes any effort or essay to do or accomplish the evil purpose that the section was enacted to prevent. Criminality does not get rid of its evil quality by the precautions it takes against consequences, personal or pecuniary. It is a somewhat novel excuse to urge that Russell's action was not criminal, because he was cautious enough to consider its cost and be sure of its success. The section, however, is not directed at success in corrupting a juror, but at the "endeavor" to do so. Experimental approaches to the corruption of a juror are the "endeavor" of the section. Guilt is incurred by the trial—success may aggravate; it is not a condition of it."

HAS A SOLDIER INJURED WHILE BEING TRANSPORTED OVER A RAILWAY OPERATED UNDER FEDERAL CONTROL, A RIGHT OF ACTION AGAINST THE DIRECTOR GENERAL?—Not a few soldiers were injured in this country while being transported over railways under federal control from one encampment to another, or to some port of embarkation. For the injuries so received suits have been filed, some of which are still pending, to secure from the Director General a judgment for damages for the negligence which caused their injuries. To attorneys who have such cases, the recent decision of Justice Thomas of the Supreme Court of Alabama, in the case of Moon v. Hines, 87 So. 603, will be interesting.

In this case plaintiff, a student at the Alabama Polytechnic Institute, enrolled as provided by Act of Congress and order of the President, was a soldier and, as such soldier in the army of the United States and in compliance with the order of the appropriate department, made a trip from Auburn, Ala., to Tulsa, Okla.; and on his return therefrom, pursuant to such order of superior military authority, received his injuries in question while being transported over the Central of Georgia Railway. Under the uncontroverted facts, the primary question raised (and urged by counsel for appellant) by the giving of the general affirmative charge as to count 2, at written request of defendant, is: Whether a soldier in the United States army, who was injured while being transported by the United States as such soldier, over a line of railway then being operated by the government, had a right of action (in tort) against the United States,

operating the transportation system at the time and place of the injury, and causing such injury.

The court answered the propounded inquiry in the negative, holding that so far as members of the army are concerned, the War Risk Insurance Act, providing compensation for injuries to a soldier, was exclusive of all other remedies, so that no right of action against the Director General, who represented the United States, could be maintained by such soldier for injuries sustained on a government controlled railroad under Acts of Congress, June 29, 1906; August 29, 1916; March 21, 1918, or February 28, 1920; such a suit would, on account of his status as a soldier, be a suit against the government.

The court laid down two general propositions as controlling in this case. First, that unless a plaintiff shows some Act of Congress authorizing him, he cannot maintain a suit against the United States. Second, that the United States cannot be sued except by its consent. The court then proceeds to show that prior to the war with Germany, Congress had never permitted itself or its officers to be sued for torts. In the Act defining the jurisdiction of the Court of Claims, the court shows, Congress specifically excepted cases "sounding in tort." The court then shows that the "Federal Controlled Transportation Act" does not give plaintiff a right to sue, since the Director General, under this Act, was not liable to any greater extent than any other agency of the federal government in respect to actions of tort except in those cases where the carriers themselves would have been liable under statute or at common law before the Act. The court shows that this was an action by a federal employee and that "no act of Congress on the day of the instant trial (March 23, 1920) expressly authorized an action ex delicto against the United States government by a soldier in its armies for personal injury sustained while in the service of the government, though that injury was inflicted in or during his transportation as a soldier."

The Court then concludes that the only remedy that a United States soldier in the service has for injuries due to the negligence of agencies of the federal government is the insurance provided for under the War Risk Insurance Act. On this point the court said:

"By the War Risk Insurance Act (38 Stat. 711), compensation is provided by the government to a soldier for death or injuries sustained by him while a soldier, if he avails himself of the terms of the act. The amount of compensation and the remedy therein prescribed is exclusive of other measures of and for liability and remedies provided for the protection of the civilian population of the general public. U. S. Comp. St. 1916 Ann. §§ 514qqq, 514tttt, 1919 Suppl. vol. 1, 43, 49; or 40 Stat. (U. S.) pp. 405, 611; or Act. Cong. Sept. 2, 1914 (38 U. S. Stat. 711) c. 293, §§ 300-313, as added by Act October 6, 1917, c. 105, § 2, and as amended by Act June 25, 1918, c. 104, §§ 10, 18. A slight analogy is also found in the denial of double recovery under the Employes' Compensation Act. Comp. St. §§ 8932a, 8932aa. Hines, Dir. Gen., v. Dahn (C. C. A.) 267 Fed. 105; Webb v. White Eng. Corp., 85 South. 729.

"It would follow, on account of his status as a soldier when sustaining his injury and his relationship to the government inflicting that injury, that a suit by him for said injury sustained in his transportation by the government as a soldier would be against the government, not permitted by an act of Congress, and is denied by public policy. In re Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636; 18 R. C. L. 1045, § 37. The reason for this rule is that plaintiff's enlistment as a soldier in the army of the United States was a contract with the government which changed his status as an individual and his relation to the state and public (In re Grimley, supra; In re Morrissey, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644; Acker v. Bell, 62 Fla. 108, 57 South. 356, 39 L. R. A. [N. S.] 454, Ann. Cas. 1913C, 1269; U. S. v. Cottingham, 1 Rob. [Va.] 615, 40 Am. Dec. 710), creating a new status with correlative rights and duties."

A PASSIVE SITUATION AS A PROXIMATE CAUSE.

In a previous issue of the Central Law Journal I had occasion to discuss the broad principles underlying proximate cause *and* legal liability.[1] In this article I wish to deal in a more specific and analytical manner with some cases where the creation, or the failure to abolish, a passive situation was held to be the proximate cause of injuries sustained because of the existence of such a passive situation.

By a passive situation I mean a physical condition which has no inherent power of motion. Before it can contribute to the injury of a person that person must come, or be brought, sent or induced, into contact with the situation. Examples of passive situations are these: a hole in the ground, an obstruction on a public highway, un-

(1) 90 Central Law Journal 188.

guarded areaway, spread rails of a railway track, a tank filled with explosive vapors, a mine without sufficient ventilation, and such like things. All of these situations have not the power of moving toward or falling upon the injured party. It is true that some of them, as for example, a box of dynamite sticks, have forces within them, which can be released, and if released will impinge upon the injured person to his hurt, but some agency external to the physical surroundings must set these forces in motion, before they can cause any injury. The situation itself does not move. Active factors must concur with the existence of the situation in the bringing about of the injury. We are concerned here with three of these active factors; (1) the acts of the party injured, (2) the acts of a third party, and (3) the operation of a force of nature, and with several types of combinations of active forces and passive situations.[2]

At the very outset of our discussion we must recall that the creation of, or failure to eliminate, a passive situation must, like every act or omission which is held to be a proximate cause of an injury, be forbidden and also be a cause of the injury sustained and for which suit is brought.[3] The prohibition may appear in that there is express legislative fiat to that effect, such as the existence of a statute or municipal ordinance that such situations shall not be created or allowed to exist, or it may appear in the legal doctrine of negligence,[4] as applied to this particular situation. In the latter case the starting point for proximate cause is the negligence in allowing the existence or creation of the situation. By negligence is meant the doing of that which a reasonably prudent man would not do. It is here that the doctrine of forseeableness is properly employed. It determines whether or not a given act or omission is a negligent act or omission. It determines whether an injury was likely to occur, whether the situation was the "natural and probable" cause of the injury. But the courts err, it is submitted, when they say that if the injury was the "natural and probably consequence of the act" that *therefore* the act was the proximate cause of the injury.[5] Negligence

(2) No attempt will be made in this article to present a collection of all the cases dealing with the subject matter of the article. The reader is referred to the following:

Beale; Cases on Legal Liability, 1st Ed. 1914, 2nd Ed. 1920. The first edition contains more cases than the second.

Beale; The Proximate Consequences of an Act; 33 Harvard Law Rev. 633.

Levitt; Proximate Cause and Legal Liability, 90 Central Law Journal 188.

Throckmorton; Damages for Fright, 34 Harvard Law Rev. 260.

Smith; Legal Cause in Actions of Tort, 25 Harvard Law Rev. 103, 223, 303.

(3) Beale; Proximate Consequences of an Act, cited supra. Levitt; Proximate Cause and Legal Liability, cited note supra.

(4) Pollock Torts, 7th Ed., page 425 et seq.

(5) In Cole v. German Savings Loan Society, 124 Fed. 116, the Court says:

"A natural consequence of an act is the consequence which ordinarily follows it—the result which may reasonably be anticipated from it. A probable consequence is the one that is more likely to follow its supposed cause than it is to fail to follow it."

The fault in these definitions is that the Court uses synonyms of the words to be defined when giving the definition. "Natural" in the sense in which it is here used is the same as "ordinary;" and "likely" is a synonym for "probable." The definitions are like the definitions of proximate cause in Bouviers Dictionary. There it says that "a proximate cause is that which is the most proximate in the order of responsible causation." Repetition of a phrase may impress it upon the mind but it does not illumine or define that phrase. This second rule means nothing or else it means a great deal more that the Courts have yet enunciated concerning it. The phrase "natural and probable" is either tautology or else it includes a method of procedure for the jury to follow in finding the facts as well as a rule of law under which the facts are to be placed. An analysis of the phrase will make this clear.

The use of the word "natural" in this connection is very unfortunate. It has so many meanings and connotes so many different things that it is difficult to keep from slipping from one meaning to the other. "Usual" would be a better word to employ. When we say that B is the natural consequence of the act A, we mean that in the experience of society it has been observed that B usually follows A in coming into or vanishing from the world of fact. That is, B so often, if not always, comes into existence after A has become manifest that the two are connected in the minds of the average person, so that with the presence of the one he takes it for granted that the other is also in existence. I press a button, for instance, and a bell rings. I release the pressure and the bell stops

starts or ends, depending on whether we begin with the act or the injury, the series of causes within which we shall find relations and connections which will determine the limits within which the proximate cause will be found, but it is not the sole basis upon which proximate causation will be erected. A situation may be dangerous, risky, likely to produce harm; but it is not necessarily a proximate cause of the injury to which it helped contribute. An unguarded areaway is a danger, a risk, something which may help to produce harm to someone but if A leaves the areaway unguarded, and B throws C into that areaway, A is not the proximate cause of the injury to C.[6] Proximate cause depends upon other reasons than the existence of a negligent, dangerous, risky, act or ommission.

When it has been found that the situation has been prohibited, and that it was a cause of the injury complained of, then the jury under instructions from the court, will determine whether the situation was the *proximate* cause of the injury. The cases show the following rules for determining proximate cause with these accompanying reasons. As we have said there are several types of cases. 1. The defendant creates, or permits the existence of, a forbidden situation, and the plaintiff through his own activities comes into contact with the situation to his hurt.

The simplest example is this. The defendant, a city street railway company, permited a dangerous obstruction to exist upon a sidewalk. The plaintiff's intestate while walking along the sidewalk is seized with an attack of vertigo, staggers and falls upon the obstruction, and the resulting shock kills him. It was held that the city was the proximate cause of the death of the deceased. A significant sentence in the opinion, to our mind is this. "Because deceased was diseased he was not precluded from walking upon the sidewalk."[7]

In Page and Bucksport[8] a city maintained a defective bridge. The plaintiff

ringing. I do these things so often that the act becomes so closely associated with the other phenomenon that that phenomenon appears as the usual consequent of the act. Or I say that the act is the usual (natural) cause of the phenomenon. The word "natural" applies to both the cause and the effect. Given a particular act we are quite sure that the specific consequence will follow. Given a particular consequence and we feel certain that a specific act must have preceded it. Given the particular act we confidently look for (anticipate, predict, expect, foresee) the consequence that has always previously appeared after such an act.

The word "probable" has the same meaning and connotation as the word "natural" (in the sense of usual); but by reason of the fact that the Courts have focused their attention more upon the act than upon the consequence it has taken on a special flavor of anticipation, of foresight. The probable consequence is, in reality, that consequence which has so often occurred after the performance of an act that we feel quite certain that it will occur again. We really look for it to happen; we anticipate its coming; we can confidently predict its arrival. we can foresee its appearance. The word probable smacks of prophecy. It connotes not the looking at a given fact and putting it into one's past experience, but rather the attempt to imagine a future result which would be like one's past experience. We can determine whether or not a given result is the natural product of a certain cause by comparing it with the existing results of similar causes. But we can only determine a probable result by assuming that the cause under observation will act like other similar causes and so produce an expected result. A natural cause can be determined by inspection and comparison; a probable cause is determined by conjecture. In the one you look at a given fact and in the other you try to guess what the result might be.

Here is, I believe, the germ of the rule of anticipation as a determinant of proximate causation. The Courts lost sight of the fact, that the feeling of prophecy could only arise after acts had been followed by consequences so often that the two have become inseparably connected; and they focused their attention upon the by-product, the idea of foresight, and made that the important, determining factor.

But before it can be said that a result can be anticipated one must know that a given act—or acts practically like it—has occurred with sufficient frequency and with results like the given injury, or like the cause of the given injury, so that the doing of the act would arouse in the mind of the one acting or in the mind of the average person who considers this act, a feeling of certainty that the given consequence would follow. With this in mind it is at once obvious that the first time a consequence follows an act there could have been no possibility of anticipation. The Courts follow this out when they say that an unusual, extraordinary event existing for the first time cannot be a "natural and probable" consequence.

(6) Milostan v. Chicago, 148 Ill. App. 540.

(7) Woodson v. Metropolitan Street Railway Co., 224 Mo. 685.

(8) 64 Maine 51.

was driving over the bridge, and his horse broke through the bridge and fell. He rushed to the rescue of his horse and while attempting to extricate the horse he was struck by the horse's head and received personal injuries. It was held that the existence of the defective bridge was the proximate cause of the plaintiff's injury. The court expressly excluded the activities of the plaintiff because he was in the pursuit of lawful activities. Said the Court: "The foundation of this liability is the services rendered or attempted to be rendered by the plaintiff for the benefit of the town, when the injury was received. The law required such services of the plaintiff. It was his duty to save the horse if possible."

In Regina v. Haines,[9] the defendant was under a duty to ventilate a mine. It was the duty of another person to notify him of the need of ventilation. The plaintiff was a miner working in the mine and was injured because of lack of ventilation. Held that the omission of the defendant to ventilate the mine was the proximate cause of the injury to the plaintiff.

In these cases, which are representative of his type of cases, the plaintiffs were where they had a right to be, and were doing what they were privileged to do, at the time they were injured. They were lawfully within a place where they had the right to assume that they would be free from aggression.[10] "A traveler on the highway has a right to assume that it is in a reasonable condition for public travel and free from obstructions,"[11] and as an Oregon court[12] has well said, "A traveler on a public road may rely upon the presumption that county officers have done their duty" in keeping public highways in proper condition.

(9) 2 Carrington v. Kirwan 368.

(10) Pound; Outline of a Course on the History and System of the Common Law, p. 40.

(11) Place v. Delaware, L. & W. R. R. Co., 141 N. Y. S. 970.

(12) Gigoux v. Yamhill County, 144 P. (Ore.) 437.

That is, each of the above plaintiffs was in the pursuit of his lawful activities. Each was operating in a place where he could assume that he had the right to function, without danger to himself. The existence of the forbidden situation cut down the spatial area within which the plaintiff was legally permitted to function without danger to himself. And, we submit, the circum scription of this spatial area is the reason for saying that the forbidden act or omission, which resulted in the forbidden siutation existing as a cause of the injury, is the proximate cause of the injury. The rule of law then would be:

Where a forbidden situation circumscribes the sphere within which a person may pursue his lawful activities, and that person is injured by coming into contact with that situation, through his own lawful activities, the forbidden situation is the proximate cause of his injuries.

The converse of this proposition is also true, namely, that if the injured party is *not* in the pursuit of his lawful activities he cannot say that the forbidden situation is the proximate cause of his injuries. The law of "contributory negligence" is based upon the fact that the injured party was doing that which he should not have done as a reasonably prudent man. If a defective bridge, that has a broken span, for example, is properly placarded to warn pedestrians by day, and is sufficiently lighted with danger signals by night, and the injured party in spite of these warnings went on the bridge to his hurt, the defective bridge is not the proximate cause of his injury. For, having been warned, lawfully, notice was given him, and his sphere of activity was lawfully cut down, and there is no starting point for proximate cause. He tried to function within an area wherein he had no right to be, and he cannot be heard to complain.[13]

2. The defendant creates, or permits the existence of a forbidden situation, and a

(13) Pollock; On Torts, 7th Ed., page 449 et seq.

third party, with whom the defendant has no causal relation, compels the plaintiff to come into contact with the situation to the hurt of the plaintiff.

Milostan v. Chicago,[14] and McIntire v. Roberts[15] illustrate this type of cases.

In Milostan v. Chicago, the defendant negligently allowed an opening in the sidewalk along the side of his building to exist without proper guards. The plaintiff came walking down the street with a friend, who in a spirit of fun shoved the plaintiff off the sidewalk into the unguarded opening. The plaintiff sustained injuries from his fall into the areaway. It was held that the existence of the unguarded areaway was not the proximate cause of the plaintiff's injuries.

In McIntire v. Roberts the facts were these. The defendant maintained an elevator well in the front part of his building. Entrance to the well was afforded directly from the street and across the sidewalk by an opening in the front wall of the building. When the elevator was not in use an iron bar was placed across the opening. When the elevator was being loaded or unloaded this bar was removed. At the time the plaintiff was passing workmen were loading the elevator with iron which they were taking from a wagon that was backed up against the curbstone directly in front of the elevator opening. As the plaintiff passed between other persons on the sidewalk and the unguarded opening, the horse suddenly backed (for unknown reasons) causing the other persons to shove the plaintiff through the opening and the plaintiff fell down the elevator shaft and was hurt. The court held that the situation was not the proximate cause of the injury, and said, inter alia, "it does not appear that the horse belonged to the defendants, or that the persons who were unloading the castings or were in control of the horse were servants of the defendants."

(14) 148 Ill. App. 540.
(15) 149 Mass. 450.

These cases, we think, were correctly decided. The plaintiff did not of his own volition, and while engaged in his own lawful pursuits come into contact with the forbidden situation. He was thrown into it. That is, there was a direct application of force upon him, which made him come into contact with the situation. If a causal relation could be shown to exist between the acts of the horse, or the acts of the third persons, and the defendants then the act or omission which connected the defendant with the third persons might be held to be the proximate cause of the injury, on the basis that a direct application of force is always a proximate cause.[16] But such a causal connection was specifically negatived by the facts. As the situation was passive, as it could not move against the plaintiff, the contact between the situation and the plaintiff cannot be attached to the defendant in any way, and as he has done nothing forbidden, he cannot be the proximate cause of the injury to the plaintiff. The rule then would seem to be this:

Where a forbidden situation exists and the plaintiff is thrown into that situation by a third person between whom and the defendant-creator of the situation no causal connection exists the forbidden situation is not the proximate cause of the injury to the plaintiff.

The preceding rules deal with situations which are entirely passive and which have no active factors within them. But there are situations which contain highly active forces. A high tension wire is entirely passive yet fifty thousand volts of electricity may be passing through it. A tank filled with gasoline vapor does not move about yet there are within it tremendous forces which can do great injury if they are set off. These forces are harmless until they are started. They can be started by their own nature, by the acts of the defendant who has created the situation, or by the acts of the plaintiff or a third party. The rule con-

(16) Cf. Authorities cited in note 2 supra.

cerning the direct application of force, will take care of the cases dealing with spontaneous eruption of the forces within a situation, the cases where the forces are released through the activities of the defendant, and the cases where there is a causal connection between the defendant and the activities of a third party. Our first rule, supra, will determine the cases where the forces are released by the activities of the injured party. We are here concerned with the cases where the forces are released by a third party between whom and the defendant no causal connection exists.

3. The defendant creates or allows the existence of a forbidden situation. A third party, between whom and the defendant no casual connection exists, cause a factor or force within that situation to issue from it and to produce the injury to the plaintiff.

Burroughs v. March Gas Co.,[17] is an exact illustration of this type of cases. Here the defendant laid a gas pipe from a main in the street to the meter in the house of the plaintiff. In order to test this pipe it was filled with gas. The pipe was defective and the gas escaped into the cellar of the plaintiff's house. B, was a gas fitter and employed S as his servant. S was told that there was an escape of gas. S went, with a lighted candle into the cellar, not to test the gas pipe, but to examine the work of B. The flame of the candle exploded the gas to the damage of the plaintiff's property. It was held that the defendant was the proximate cause of the injury.

In Quaker Oats Co. v. Grice[18] a similar situation existed. Here milling operations filled the rooms of the grain elevator with combustible dust. A third person in light ing his pipe exploded this dust, a fire started and as a result the plaintiff's buliding was destroyed. It was held that the defendant was the proximate cause of the injury. But Stone v. Boston and Albany R. R.,[19] on practically a similar situation held the other way, as did Seith v. Commonwealth Electric Co.[20] In the last case there was a strong dissenting opinion on the ground that the third party was doing his legal duty in acting as he did. I am of the opinion that the dissenting view is the correct one. The facts were these. The defendant company allowed a live wire to dangle down on the sidewalk and street, along which pedestrians were passing. A policeman struck the wire with his club to get it out of the way. The wire struck the plaintiff who was walking by, and injured him. It was held that the omission of the company was not the proximate cause of the injury. Vickers, J., dissenting, said: "The injury occurred by the attempt of the policeman in good faith to remove a danger from a public highway, placed there by the defendant. Applying the law to these facts I think the defendant is liable."

I support the dissenting opinion because it appears to me that here there is a clear case of the defendant inducing the activity of the plaintiff by the creation of a forbidden situation. It is really like Keaton v. The State,[21] and is a direct application of force. And if we look upon the dangling wire as simply a passive situation still the defendant is liable on the basis of the rule which grows out of this type of case, by weight of authority, though it must be conceded that there is a long line of cases which follow the case of Seith v. Commonwelath Electric Co. This rule is:

Where a forbidden situation exists and a third person, between whom and the defendant-creator of the situation no causal connection exists, in the lawful pursuit of his activities causes a factor or force within that situation to issue from it to the injury of the plaintiff, the situation is the proximate cause of the injury.

The reason for this rule is an application of the reason in rule one to the acts

(17) L. R. 5 Ex. 67.
(18) 195 Fed. 441.
(19) 171 Mass. 536.
(20) 241 Ill. 252.
(21) 41 Tex. Cr. R. 621.

of a third party. That is, the defendant has circumscribed the sphere within which the third party has the right to assume he can act without injury either to himself or to anyone else. This releases the third party from being the proximate cause and as the defendant has done an unlawful thing by means of his forbidden situation and this unlawful thing resulted in a direct application of force to the injury of the plaintiff the defendant's creation is held to be the proximate cause of the injury.[22]

4. We shall now turn to the cases where the active force which concurs with the existence of a passive situation to produce injury to the plaintiff is a force of nature. Two railroad cases, which have been the subject of much judicial discussion present the problems involved squarely and clearly.

The first case is that of Denny v. The New York Central R. R.[23] Here it appeared that the defendant railroad had undertaken to carry goods belonging to the plaintiff from Suspension Bridge to Albany and there to deliver it to a carrier for further transportation to Boston, Mass. The company was negligent in transporting the goods from Suspension Bridge to Syracuse so that it was delayed at Syracuse for six days. Then the goods were carried on schedule time from Syracuse to Albany and placed in a freight depot at that place. While the goods were properly cared for at Albany there was a sudden flood in the Hudson River and this flood produced the alleged injury to the goods. It was held that the negligence of the railroad company was not the proximate course of the injury to the plaintiff's goods. The Court said:

"In this case the defendants failed to exercise due care and diligence in not being possessed of a sufficient number of efficient working engines to transport the plaintiffs wool with the usual, ordinary and reasonable speed. The consequence of this failure on their part was that the wool was detained six days at Syracuse. This was the full and entire effect of their negligence and for this they are clearly responsible. But in all that occurred afterwards there was no failure in the performance of their duty. There was no delay and no negligence in any part of the transportation between Syracuse and Albany and upon reaching the latter place the wool was safely and properly stored in their freight depot. It was their duty to make this disposition of it. They had then reached the terminus of their road; the carriage of the goods was then complete; and the duty only remained of making delivery. The deposit of the wool in the depot was the only delivery which they were required to make; and having made that their liabilities as carriers thence forward ceased."

That is, the situation which the defendant created, namely goods lying in a freight depot. was not a forbidden situation. Therefore even though the flood did overwhelm the situation there is no way of attaching defendant's act or omission to the action of the flood. The starting point, namely a forbidden act or omission which creates, or permits the existence of, a forbidden situation is not there. The delay at Syracuse in an a place and at a time other than the place and time where the damage to the plaintiff occurred. That is the negligence of the defendant was at a time and in a place which were not concurrent with the activity of a force of Nature which was the active, impinging factor that contributed to the injury of the plaintiff. The actual negligence in transportation came to an end in Syracuse though the practical result was the same as if there had been a continuing loss of time in transportation during the entire period of transportation from Suspension Bridge to Albany so that in either case the goods would have arrived at Albany six days after the time when it should have arrived had the carrier been properly diligent. This practical result is not looked at by the courts when they are determining whether the situation is the proximate cause of the

(22) Cf. Watson v. K. & I. Bridge and R. R. Co., 137 Ky. 619; Compare Harton v. Forest City Telephone Co., 146 N. C. 429, with Clark v. Chambers 3 Q. B. D. 327. An excellent case directly in point is Chacy v. City of Fargo, 5 N. D. 173; as is Pastene v. Adams, 49 Cal. 87.

(23) 3 Gray (Mass.) 481.

injury or not. And the courts, it is submitted, are correct in their approach, for to do otherwise would be to substitute the finding of a *cause* for the finding of *a proximate cause.*

A consideration of the Green-Wheeler Shoe Co. v. Chicago, Rock Island and Pacific Railway Co.,[24] will show the converse of the preceding case, and from the two, the rule of law governing this type of cases can be constructed.

In this case it was shown on an agreed statement of facts that the defendant was guilty of negligent delay in forwarding goods belonging to the plaintiff from Ft. Dodge to Kansas City. At Kansas City the goods were lost because of the action of a flood" which was so unusual and extraordinary as to constitute an act of God, and that if there had been no such negligent delay the goods would not have been caught in the flood referred to or damaged thereby." * * * We have presented for our consideration, therefore, the simple question whether a carrier who by a negligent delay in transporting goods has subjected them, *in the course of transportation* (italics mine) to a peril which has caused their damage or destruction, and for the consequence of which the carrier would not have been liable had there been no negligent delay intervening, is liable for the loss." The Court then held that the defendant was liable and that the situation which the defendant created was the proximate cause of the injury to the plaintiff.

Here it is at once obvious that the situation was created by a forbidden act, and that at the time and in the place where the flood acted upon the goods the defendant was at fault. There was a concurrence in time and space between the forbidden situation and the activity of a force of Nature. At every point in space during the process of transportation the defendant was at fault in creating the then existing situation, and in each and every point of that transportation had the goods been hurt by a force of nature the situation created by the defendant would have been called the proximate cause of the injury. This case is supported by Jackson v. Wisconsin Telephone Co.[25] The defendant company in putting a telephone into a house standing next to the plaintiff's barn, placed, without permission, a connecting wire between a flagpole on the roof of the plaintiff's barn and a flagpole on the roof of the house where the telephone was placed. This wire was also attached to the ground wire belonging to the company which was placed in the highway. Later on the company removed the telephone from the house but left the ground wire and the connecting wire, and also a large piece of wire dangling on the roof of the barn. Lightning struck the flagpole on the roof of the house, and was conducted by the connecting wire to the roof of the barn which caught fire and was destroyed. It was held that the defendant was the proximate causer of the injury to the plaintiff.

Here it is obvious that the situation created by the defendant was constantly a forbidden one. At every moment of time the wrongfulness of the defendant's act is present within the place where the force of nature acted. The situation was forbidden at the time and in the place where the force of nature actively contributed to the injury of the plaintiff. That is what made the situation the proximate cause of the injury. An analysis of one case more will make this position stronger.

In the Dubuque Wood and Coal Ass. v. Dubuque[26] the facts were as follows. The city of Dubuque was under a duty of maintaining in passable condition a bridge over a slough of the Mississippi River, which bridge led to the levee upon the river. The plaintiff, wood dealers, had wood piled on the levee. The City allowed the bridge to get out of repair and become impassable. Because of this defective bridge the plaintiff was unable to get his wood away from

(24) 130 Ia. 123.

(25) 88 Wis. 243.
(26) 30 Iowa 176.

the levee. While the wood remained upon the levee the river overflowed and the wood was damaged. It was held that the defective bridge was not the proximate cause of the injury to the plaintiff. That is, as we look at the facts, the forbidden situation was at one place and the injury occurred at another place. There was no concurrence in time and space of the forbidden situation and the activity of the natural force both of which contributed to the plaintiff's injury.

We submit, therefore, that the rule governing this type of cases is as follows: *Where the forbidden situation concurs in time and place with the incoming of a natural force and both contribute at the same time and place to the injury of the plaintiff, the situation is the proximate cause of the injury to the plaintiff; and where the forbidden situation does not concur in time and place with the incoming of the natural force and the natural force injures the plaintiff the situation is not the proximate cause of the injury.*

Summing up we find this general rule emerging: Where the forbidden situation concurs in time and place with the acts of an injured party, or of a third person, who is in the pursuit of his lawful activities, or with the incoming of natural forces, to the injury, at that time and place, of the injured party, the forbidden situation is the proximate cause of the injury; and where such forbidden situation does not so concur and so contribute to the injury the forbidden situation is not the proximate cause of the injury.

If the forbidden situation is the proximate cause of the injury, then he who creates, or allows the existence of, this forbidden situation is liable for the damages which the injured person has suffered; if the forbidden situation is not the proximate cause then he is not liable for such damages.

The reasons why such liabilities are imposed depend not upon the rules governing proximate cause but upon the principles underlying the law of damages. Such reasons are outside the scope of this article, but this brief suggestion of the reasons is ventured.

The law aims to compensate, so far as it is possible, every person for injuries he has sustained without fault on his part. It is impossible to exact compensation from a natural force; organized society has not yet perfected a system whereby it will directly compensate injured, innocent persons for their injuries; there is no reason why an innocent, properly acting third party should compensate another innocent person for injuries the latter may have suffered. The balance, therefore, has to be struck between an innocent sufferer and one who by his wrongful act or omission has contributed to the harm done the innocent person. The loss may be allowed to lie where it fell. That seems unconscionable. The remaining possibility is to make the wrongfully acting person shoulder the loss. That is usually done.

ALBERT LEVITT.

Washington, D. C.

INTERNAL REVENUE—PROFIT ON SALE OF STOCK OR BONDS.

WALSH, Collector of Internal Revenue, v. BREWSTER.

Argued March 10 and 11, 1921. Decided March 28, 1921.

41 Sup. Ct., 392

Where the market value of bonds on March 1, 1913, was less than the purchase price, the gain derived from a sale of the bonds on which the income tax can be levied is the difference between the sale price and the original purchase price, not the difference between the sale price and the market value on the stated date.

In this case the defendant in error sued the plaintiff in error, a Collector of Internal Revenue, to recover income taxes for the year 1916, assessed in 1918, and which were paid under protest to avoid penalties. The defendant answered, the case was tried upon an agreed

statement of facts, and judgment was rendered in favor of the taxpayer, the defendant in error. The case is properly here by writ of error. Towne v. Eisner, 245 U. S. 418, 38 Sup. Ct. 158, 62 L. Ed. 372, L. R. A. 1918D, 254.

The defendant in error was not a trader or dealer in stocks or bonds, but occasionally purchased and sold one or the other for the purpose of changing his investments.

Three transactions are involved.

The first relates to bonds of the International Navigation Company, purchased in 1909, for $191,000 and sold in 1916 for the same amount. The market value of these bonds on March 1, 1913, was $151,845, and the tax in dispute was assessed on the difference between this amount and the amount for which they were sold in 1916, viz. $39,155.

The trial court held that this apparent gain was capital assets and not taxable income under the Sixteenth Amendment to the Constitution of the United States, and rendered judgment in favor of the defendant in error for the amount of the tax which he had paid.

The ground upon which this part of the judgment was justified below is held to be erroneous in No. 608, Merchants' Loan & Trust Co., as Trustee, v. Julius F. Smietanka, Collector of Internal Revenue, 254 U. S.——, 41 Sup. Ct. 386, 65 L. Ed.——, this day decided, but, since the owner of the stock did not realize any gain on his original investment by the sale in 1916, the judgment was right in this respect, and under authority of the opinion and judgment in No. 663, Goodrich v. Edwards, Collector, 254 U. S. ——, 41 Sup. Ct. 390, 65 L. Ed. ——, also rendered this day, this part of the judgment is affirmed.

The second transaction involved the purchase in 1902 and 1903 of bonds of the International Mercantile Marine Company for $231,300, which were sold in 1916 for $276,150. This purchase was made through an underwriting agreement such that the purchaser did not receive any interest upon the amount paid prior to the allotment to him of the bonds in 1906, and he claimed that interest upon the investment for the time which so elapsed should be added as a part of the cost to him of the bonds. But this claim was properly rejected by the trial court under authority of Hays v. Gauley Mountain Coal Co., 247 U. S. 189, 38 Sup. Ct. 470, 62 L. Ed. 1061.

It is stipulated that the market value of these bonds on March 1, 1913, was $164,480, and the collector assessed the tax upon the difference between the selling price and this amount, but since the gain to the taxpayer was only the difference between his investment of $231,300 and the amount realized by the sale, $276,150, under authority of No. 663, Goodrich v. Edwards, Collector, this day decided, he was taxable only on $44,850.

The District Court, however, held that any gain realized by the sale was a mere conversion of capital assets, and was not income which could lawfully be taxed. In this respect the court fell into error. The tax was properly assessed, but only upon the difference between the purchase and the selling price of the bonds as stated.

The third transaction related to stock in the Standard Oil Company of California, received through the same stock dividend involved in Eisner v. Macomber, 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570. The District Court, upon authority of that case, properly held that the assessment made and collected upon this dividend should be refunded to the defendant in error.

It results that as to the profit realized upon the second transaction, as indicated in this opinion, the judgment of the District Court is reversed, but as to the other transactions it is affirmed for the reasons and upon the grounds herein stated.

Judgment reversed in part, affirmed in part, and case remanded.

NOTE—*Profits on Sale of Stock or Bonds as Income.*—The United States Supreme Court has defined "income" as, "The gain derived from capital, from labor, or from both combined, provided it be understood to include profits gained through sale or conversion of capital assets." Eisner v. Macomber, 252 U. S. 189, 207, 40 Sup. Ct. 189, 193, 64 L. ed. 521, 9 A. L. R. 1570.

"It is thus very plain that the statute imposes the income tax on the proceeds of the sale of personal property to the extent only that gains are derived therefrom by the vendor." Goodrich v. Edwards, 41 Sup. Ct. 390. This case holds that no income tax can be levied on the sale of stock for a price greater than its value on March 1, 1913, but less than the price paid for the stock before that date, since in such case there was no "gain."

Gain or profit from sales of corporate stock or other personal property which are taxable as income are not limited to sales by one engaged in buying and selling as a business, but includes gains from an isolated sale by an individual owner. Merchants' Loan & Trust Co. v. Smietanka, 41 Sup. Ct. 386. In the last cited case the court said:

"It is elaborately argued in this case, in No. 609, Eldorado Coal & Mining Co. v. Harry W. Mager, Collector, etc., submitted with it, and in other cases since argued, that the word 'income' as used in the Sixteenth Amendment and in the Income Tax Act we are considering does not include the gain from capital realized by a single isolated sale of property, but that only the profits realized from sales by one engaged in buying and selling as a business—a merchant,

a real estate agent, or broker—constitute income which may be taxed.

"It is sufficient to say of this contention that no such distinction was recognized in the Civil War Income Tax Act of 1867 (14 Stat. 471, 478), or in the act of 1894 (28 Stat. 509, 553), declared unconstitutional on an unrelated ground; that it was not recognized in determining income under the Excise Tax Act of 1909, as the cases cited, supra, show; that it is not to be found, in terms, in any of the income tax provisions of the Internal Revenue Acts of 1913, 1916, 1917, or 1919 (40 Stat. 1057); that the definition of the word 'income' as used in the Sixteenth Amendment, which has been developed by this Court, does not recognize any such distinction; that in departmental practice, for now seven years, such a rule has not been applied; and that there is no essential difference in the nature of the transaction or in the relation of the profit to the capital involved, whether the sale or conversion be a single, isolated transaction or one of many. The interesting and ingenious argument, which is earnestly pressed upon us, that this distinction is so fundamental and obvious that it must be assumed to be a part of the 'general understanding' of the meaning of the word 'income,' fails to convince us that a construction should be adopted which would, in a large measure, defeat the purpose of the amendment.

"The opinions of the courts in dealing with the rights of life tenants and remaindermen in gains derived from invested capital, especially in dividends paid by corporations, are of little value in determining such a question as we have here, influenced as such decisions are by the terms of the instruments creating the trusts involved and by the various rules adopted in the various jurisdictions for attaining results thought to be equitable. Here the trustee, acting within its powers, sold the stock, as it might have sold a building, and realized a profit of $700,000, which at once became assets in its possession free for any disposition within the scope of the trust, but for the purposes of taxation to be treated as if the trustee were the sole owner.

"Gray v. Darlington, 5 Wall. 63, 21 L. Ed. 45, much relied upon in argument, was sufficiently distinguished from cases such as we have here in Hays v. Gauley Mountain Coal Co., 247 U. S. 189, 191, 38 Sup. Ct. 470, 62 L. Ed. 1061. The differences in the statutes involved render inapplicable the expressions in the opinion in that case (not necessary to the decision of it) as to distinctions between income and increase of capital.

"In Lynch v. Turrish, 247 U. S. 221, 38 Sup. Ct. 537, 62 L. Ed. 1087, also much relied upon, it is expressly stated that—

"'According to the fact admitted, there was no increase after that date (March 1, 1913), and therefore no increase subject to the law.'

"For this reason the questions here discussed and decided were not there presented.

"The British income tax decisions are interpretations of statutes so wholly different in their wording from the acts of Congress which we are considering that they are quite without value in arriving at the construction of the laws here involved."

HUMOR OF THE LAW.

The lawyer for the prosecution, in cross-examination, was trying to make the witness admit that there was such a thing as a miracle.

"Let us suppose that you were on the top of a ten-story building," he began. "Now let us suppose, further, that you fell from the top of this building upon the pavement in the street below and suffered no injury whatever. Wouldn't that be a miracle?"

"No, sir; that would merely be an accident," stated the witness.

The lawyer smiled. "Possibly so," he admitted. "But let us suppose that you fell from the top of this ten-story building for a second time, and for a second time were uninjured. Would you not then term it a miracle?"

"No, sir," the witness replied unhesitatingly. "That would be merely a coincidence."

The latter was a bit nonplussed, but determined to try again. "Suppose you fell a third time and were again uninjured. That would surely be a miracle!"

"No, sir," insisted the witness. "I'd call it a habit then!"—*Life.*

An Irish witness was called to give his testimony. "Did you see the shot fired?" was the first question asked.

"No, sir, but I heard it."

"That is not satisfactory," remarked the judge. "You may step down."

As the Irishman turned to go he laughed out loud, whereupon he was rebuked by the court and told he was in contempt.

"Did your honor see me laugh?" inquired the witness, respectfully.

"No, but I heard you."

"Excuse me, your honor, but that isn't satisfactory."

Then the court did not try to restrain his own laughter.—*Houston Post.*

The woman district attorney was on her first case. For half a minute she thundered oratory, piling question after question upon the quaking defendant, without giving him a chance for a reply. Then after her fifteenth, "Now didn't you?" she paused for breath. In the ensuing silence those in the court room heard the judge murmur dreamily:

"Yes, my dear, you're perfectly right, perfectly right."

His Honor: "Get the prisoner's name, so we can tell his mother." Rookie: "He sez his mither knows his name."—*Vaudeville News.*

WEEKLY DIGEST.

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1. **Assault and Battery**—Search of Prisoner.—How far an officer having made an arrest may go in his search of the peerson of the respondent and his removal of personal effects is a question of fact for the jury depending upon the law, the facts and circumstances of the particular case in which the alleged search and justification are involved; and court did not err in submitting to the jury whether constable was guilty of assault and battery in an action for damages where he used force to remove money from plaintiff's pockets, when there was no need to search for purposes of identification, and plaintiff could have nothing on his person with which he might effect an escape, both arms being cut off.—Paradis v. Beaulieu, Me., 112 Atl. 718.

2. **Attorney and Client**—Lien on Land.—Where attorney brought suit for the recovery or perfection of title to land under an express contract with the client that the client would execute a deed to a certain parcel of the land as compensation for professional services, the attorney had a lien on such parcel of land, and a full compliance with the contract by conveyance of the land at its real value to the attorney was not a general assignment of the property within the purview of Code 1907, § 4295, and the rights of the attorneys were prior to a judgment obtained against the client between the time of the making of the contract and the conveyance of the land.—W. T. Rawleigh Co. v. Timmerman, Ala., 87 So. 372.

3. **Bankruptcy** — Preference. — Where the bankrupt was accustomed to deposit in a bank checks drawn on other banks, and immediately thereafter to check against such deposits, without waiting to see whether the checks were good, and the bank, which was required by the clearing house to make good worthless checks credited by it, required payments from the bankrupt to protect itself against excessive use of its cash reserves, there was no indebtedness from the bankrupt to the bank, and such payments were not preferences.—Snipes v. Mutual Trust Co., U. S. D. C., 270 Fed. 318.

4.——Reclamation. — Bankrupts, who were brokers, borrowed a certificate of stock from another brokerage firm, giving as collateral security their check for its agreed value. On the next day they repaid the loan by delivery of a different certificate, which they bought from a third firm, but had not paid for; and the lender, supposing the collateral check had been paid, gave their own check in repayment, which was collected by bankrupts' receiver appointed in the meantime. The collateral check was not paid, owing to the intervening bankruptcy. Held, that the lending firm was entitled to reclaim the proceeds of their check as having been given without consideration, and that the firm which sold the second certificate of stock had no claim on such fund.—In re Toole, U. S. C. C. A., 270 Fed. 195.

5.——Surviving Partner.—Where a partnership has entered into a road construction contract, and the liability of the contractors is joint and several, the bankruptcy of two of the partners does not release the surviving partner from his obligation to complete the contract in view of Bankruptcy Law 1898, § 5 (U. S. Comp. St. § 9589).—Kimmel v. State, Ind., 130 N. E. 239.

6.——Unloading Street Rubbish.—Where, on bankruptcy of firm having contract for disposing of street sweepings of city, city took possession of scows and plant of such firm under its contract, and ordered owner of certain scows, chartered to the bankrupt and loaded by it, to unload such scows at some other place than the plant of the bankrupt, the city was liable to such owner for the cost of such unloading, and the city, in proving its damages against the bankrupt, could not recover such cost; neither the bankrupt nor the owner of such scows being under any obligation to discharge the cargoes anywhere except at the bankrupt's dumps.—Connett v. City of New York, U. S. C. C. A., 270 Fed. 197.

7. **Banks and Banking**—Act of Official.—Where a debtor of a bank delivered to the president notes in payment of his notes held by the bank, the bank was bound by the act of its president in receiving such payment, though that official converted the payment to his own use.—Barnett v. Bank of Pangburn, Ark., 228 S. W. 369.

8.——Deposits in Failing Bank.—Failing bank may not pay depositor's check in exchange for moneys on deposit, having reason to believe that the exchange will not be paid, and where exchange dishonored depositor paying payee of check has rights of unsecured depositor.—Stanley v. Green, Ala., 87 So. 356.

9. **Bills and Notes**—"As Per Contract.—Under Negotiable Instruments Law (Code 1907, § 4960), providing that an unqualified order or promise to pay is unconditional, though coupled with a statement of the transaction which gives rise to the instrument, a promissory note, being in the usual form, containing the usual phrase "value received, with interest," and usual clause waiving exemption, etc., is not rendered non-negotiable by the insertion, in the blank space opposite the word "No." in lower left-hand corner of note, of the words "as per contract," since to destroy negotiability the reference to a collateral contract must show that the obligation to pay is burdened with conditions of the contract, and statutory provision is merely declaratory of common law.—Strand Amusement Co. v. Fox, Ala., 87 So. 332.

10. **Carriers of Goods**—Liability of Express Company.—Where defendant express company engaged to transmit for plaintiff money to plaintiff's sister at Erivan, Russia, a city in the Caucasus Mountains near the Persian Frontier, and plaintiff knew that defendant company did not undertake itself through its own agents to deliver the purchased rubles, but that it agreed to transfer them through corresponding subagents to plaintiff's sister at place of destination, unless the selected sub-agents in Russia were not suitable persons to receive and transmit the money, plaintiff is not entitled to recover from defendant company as for breach of its contract through failure to deliver the funds to the payee.—Alemian v. American Exp. Co., Mass., 130 N. E. 253.

11.——State Power to Fix Rates.—Through the state Legislature in regulating the intrastate rates of a carrier has a wide range of power to prescribe reasonable charges, and is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on any business, it cannot compel a carrier to transport a commodity or a particular class of traffic at a loss or without substantial compensation, even though the entire volume of the carrier's intrastate business returns a remun-

erative revenue on its capital.—Vandalia R. Co. v. Schnull, U. S. D. C., 41 Sup. Ct. 324.

12. **Champerty and Maintenance**—Attorney as Judgment Creditor.—Where the attorney for plaintiff trustee in bankruptcy had a direct interest as a judgment creditor of the bankrupt in securing for the benefit of creditors, including himself, property alleged to have been conveyed away by the bankrupt with intent to defraud them, agreement between the trustee and the attorney, made in accordance with the order of the referee in bankruptcy, to prosecute suits for the recovery of the property, the attorney filing bond with the trustee saving him harmless from costs and agreeing to receive no compensation if no assets were recovered, was not unlawful as champertous.—Reed v. Chase, Mass., 130 N. E. 257.

13. **Constitutional Law**—Due Process.—Where the Railway Commission, as a condition of an order requiring the physical connection of two companies, directs that the two companies shall divide all new business, in such proportions that the relation in size of the one company to the other shall not change, but shall be continuously maintained so long as the order of exchange of service shall operate, the right of either company to accept as subscribers all who shall apply in the territory covered by their system is denied, and the effect of such order is to take the company's property without due process of law.—Blackledge v. Farmers' Independent Telephone Co., Neb., 181 N. W. 709.

14.——"Property."—A vested right of action is "property," which cannot be defeated or modified by statute, though a statute may change the remedies therefor.—Mizell v. Atlantic Coast Line R. Co., N. C., 106 S. E. 133.

15. **Contracts**—Oral.—An independent oral contract may be entered into between the parties to a written contract and contemporaneous therewith; but such oral contract must be independent in fact, and must not be a contradiction, modification, or qualification of the written contract, either as to its enforcement, its consideration, or its executory obligation.—Blackledge v. Puncture Proof Retread Co., Ia., 181 N. W. 662.

16. **Corporations** — Unliquidated Claims. — When a corporation divests itself of all its assets by distributing them among the stockholders, those having unsatisfied claims against it may follow the assets, after recovering judgment, though their claims were contested and unliquidated when the assets were distributed. —Pierce v. United States, U. S. S. C., 41 Sup. Ct. 365.

17.——Voting Proxy.—Though Revenue Act 1919 (U. S. Comp. St. Ann. Supp. 1919, § 6318n) provides for retention in force of laws relating to collection of taxes so far as applicable, Act Cong. June 13, 1898, making certain unstamped instruments, including voting proxies, invalid, did not become a part of Revenue Act of 1919 so as to forbid the voting of an unstamped proxy at corporate election, since in the passage of Revenue Act of 1914 these sections were incorporated in the bill passed by the House of Representatives, but eliminated by the Senate. —State v. Miller, Wis., 181 N. W. 745.

18. **Damages** — Excessive. — In determining whether or not a verdict for damages for personal injuries is excessive, court is authorized to take into consideration that the purchasing power of money is not as great as formerly.—Roach v. Kansas City Rys. Co., Mo., 228 S. W. 520.

19. **Deeds**—Conveyance to Imbecile.—Undelivered voluntary conveyance to imbecile held ineffective where proof of intention that it should take effect insufficient; intent essential to delivery.—Willingham v. Smith, Ga., 106 S. E. 117.

20. **Divorce**—Alimony.—Where a divorce was granted with an allowance of $5 a week for support of the wife and infant daughter of the marriage, the daughter's subsequent marriage did not automatically modify the decree; the award being to the wife and not to the wife and daughter.—Warren v. Warren, N. J., 112 Atl. 731.

21. **Elections**—"Distinguishing Mark."—Under St. 1917, p. 374, § 48, forbidding rejection of the ballot where marks cannot be definitely shown to be intentionally distinguishing marks, a distinguishing mark is one which is made deliberately and which may be used as a means of identification, but an unauthorized mark inadvertently placed on the ballot by the voter, not of a character to be used readily for corrupt purposes, does not prevent counting the ballot.—James v. Stern, Nev., 195 Pac. 1104.

22. **Eminent Domain**—New Ditch.—In proceedings to condemn a right of way for a ditch and the right to carry water through respondent's ditch, the fact that there was another route for the ditch, which, however, would require the acquisition of a right of way for and the construction of a flume for over 2,000 feet at an elevation of from 10 to 20 feet above the ground, does not disprove the necessity for the right petitioner seeks to condemn, since such other route is neither feasible nor practical.—State v. Superior Court, Wash., 195 Pac. 1051.

23. **Frauds, Statute of**—Original Promise.—Where promisor was interested in a mine and desired to have it developed, his promise to miners to pay them their wages if they would return to work after they had quit working because of the failure of the mining company to pay them their wages, was an original agreement though the miners had not released the mining company from liability for wages, and hence was not required to be in writing under the statute.—Moon v. Greenlee, Col., 195 Pac. 1100.

24. **Fraudulent Conveyances**—Claimant in Execution.—Where after a note was given, but before judgment was obtained theron, the maker made a voluntary conveyance of land to his wife, and execution was levied on the land and a claim interposed by the wife, she was not concluded by the judgment, but could show that the note was procured by fraud, and that the husband did not owe the payee anything.—Houston v. Campbell, Ga., 106 S. E. 87.

25. **Garnishment**—Bank Deposit.—Funds in the hands of a bank on deposit by the federal director general of railroads to the credit of a trustee for application to the operating expenses of a railroad, which the government had undertaken to guaranty, held not subject to garnishment by the railroad's judgment creditor, a trustee not being subject to garnishment during pendency of the trust in an action to collect a debt which the cestui que trust owes. —Greening v. Planters' Bank & Trust Co., Ark., 228 S. W. 382.

26. **Gas**—Condition of Establishment.—The government may make it a condition of allowing the establishment of gas works in the District of Columbia that its needs and those of the District be satisfied at any price that it may fix, and others choosing to take gas must submit to such enhancement of price as is assignable to the government's demands.—Hollis v. Kutz, U. S. S. C., 41 Sup. Ct. 371.

27. **Highways**—Driven Cattle.—In an action against an automobile owner for injuries to plaintiff's cows on the highway in the custody of boys, the test of plaintiff's negligence preventing his recovery was not whether the boys were competent or incompetent, but whether they did some act or made some omission contributing to the injuries.—Andrews v. Dougherty, Conn., 112 Atl. 700.

28. **Husband and Wife**—Community Property.—On death of mother the children become immediately vested with the title to one-half of the property acquired by the mother and the father; no probate being necessary to pass the title.—Goulette v. Goulette, Wash., 195 Pac. 1045.

29.——Contract for Services.—The performance by a woman of her contract to care for a man in return for his property was rendered impossible by her marriage to him, where the services were such as would be required of her without compensation by her marital status.—Bohanan v. Maxwell, Ia., 181 N. W. 683.

30. **Insurance**—Assignment.—Where a policy on the life of a married woman, who was liable, at least as an indorser, for debts of her husband, was first assigned by the woman and her husband, the beneficiary, as security, and later the insured and beneficiary assigned all their interest in the policy for an amount

slightly greater than its surrender value, the assignee acquired all rights to the policy; it being valid in its inception, and the assignment being assented to by the insurer.—Aetna Life Ins. Co. v. Kimball, Me., 112 Atl. 708.

31.——Proof of Loss.—The inconvenience caused to plaintiff after the fire by the company's request for proof of loss, being the signing of the proof of loss after it had been prepared by the company's representative from information furnished by plaintiff, was not sufficient to establish estoppel to claim a forfeiture of the policy for breach of the provision against additional insurance.—Emmons v. Farmington Mut. Life Ins. Co., Wis., 181 N. W. 732.

32. **Intoxicating Liquors**—State Law.—The Eighteenth Amendment and the Volstead Act do not supersede or abrogate the existing state prohibition law.—Kyzar v. State, Miss., 87 So. 415.

33. **Landlord and Tenant**—Breach of Lease.—By accepting rent accruing after a breach of the conditions of the lease, the landlord waives the right to terminate the lease for such breach if it was known to him when he received the rent, but does not waise the right to terminate it if the breach was not then known to him.—Thomas Peebles & Co. v. Sherman, Minn., 181 N. W. 715.

34.——Cutting Trees.—In an action for the penalty for cutting of trees under Code 1907, § 6035, plea alleging that defendant had "undisputed adverse possession" of the lands, but affirmatively showing that defendant held under lease from plaintiff, by which he was bound to protect trees on premises and not destroy them, and which did not aver that defendant's possession was under color of title and claim of right, held insufficient to state a defense.—Garrett v. Berry, Ala., 87 So. 340.

35.——Renewal of Lease.—Where lease gave tenant the right to renew for either one, two, three, four, or five year period, as he might elect, the option to renew could be exercised only once, and after a renewal for a one-year period, the lessee could not thereafter again renew lease for another period.—Salzer v. Manfredi, Wash., 195 Pac. 1046.

36. **Libel and Slander**—Innuendo.—Where alleged slanderous words have a double or doubtful meaning, plaintiff may by innuendo charge which meaning he attributes to them, when it becomes a question for the jury to say whether the language used was spoken with that meaning or uttered in different sense.—Pfeifly v. Henry, Pa., 112 Atl. 768.

37. **Licenses**—Easement in Land.—Where a license is not a bare, naked right of entry, but includes the right to erect structures and acquire an interest in the land in the nature of an easement, by the construction of improvements thereon, the licensor may not revoke the license and restore his premises to their former condition after the licensee has exercised the privilege given by the license and erected the improvements at considerable expense.—Lashley Telephone Co. v. Durbin, Ky., 228 S. W. 423.

38. **Mandamus**—Extent of Agreement Immaterial on Right to Remedy.—Where the record failed to show that the case was tried by a jury of 11 by agreement, and defendant's motions to set aside the judgment and to amend the record to show such fact were denied, he might have saved his point by an exception at the trial, or by a bill of exceptions to the denial of the subsequent motion, and then have brought a writ of error; but mandamus would not lie to correct the judge's conclusion.—Ex Parte Riddle, U. S. S. C., 41 Sup. Ct. 370.

39. **Master and Servant**—Assault by Another Employee.—Where an empolyee, angered at a playful act of another employee, made a vicious assault on him with a milk bottle and attempted to assault him with a cobblestone, whereupon the other employee knocked him against a radiator, he could not recover compensation for the injury, in view of Workmen's Compensation Law, § 10, providing compensation, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or another.—Stein v. Williams Printing Co., N. Y., 186 N. Y. S. 705.

40.——Compensation for Hernia Not Sustained.—An award of compensation on account of a hernia could not be sustained on evidence that the employee, while working a handle up and down with three other men, felt a pain in the groin, without any evidence of any unusual happening, or evidence that the conditions prevailing could produce the condition complained of, merely because the injured employe was the taller of the men working on the handle.—Noble v. Mathieson Alkali Co., N. Y., 186 N. Y. S. 752.

41.——Course of Employment.—Where female employee used a freight elevator in leaving the building to go home, an injury received by her held not to arise out of her employment under the Workmen's Compensation Act; it not being a custom for employees to use such elevator, and she having no reason for using the elevator.—Dulac v. Dumbarton Woolen Mills, Me., 112 Atl. 710.

42.——Course of Employment.—Where the nature of the employment is such as to expose a worker to a wrongful act by another worker, which may reasonably be said to have been induced by the peculiar conditions of the employment, the manner in which it was carried on, and the appliances required, such an act may reasonably be said to "arise out of the employment."—Socha v. Cudahy Packing Co., Neb., 181 N. W. 706.

43.——Delegation of Duty.—In a miner's action for injuries due to failure to furnish timbers after request of one in exclusive charge of a mine, it was error to exclude evidence of notice to the owner of failure to furnish props and of a rule of the owner by which all matters relating to props were placed in the hands of a designated person controlled by the superintendent in view of Anthracite Mine Act of 1891; such evidence tending to show that the duty of furnishing timbers had not been placed on the mine foreman, but on a fellow servant.—Di Iordio v. Hines, Pa., 112 Atl. 742.

44.——In determining the question of dependency under the Workmen's Compensation Act, the status of the claimant in society and his reasonable needs and expectations should be considered, since there is no dependency if the claimant's own earnings were sufficient to sustain himself and family in a manner befitting his class and position in life.—MacDonald v. Employers' Liability Assur. Corporation, Me., 112 Atl. 719.

45.——Duty to Guard Elevator Shaft.—In an action under the Employers' Liability Act by an elevator man, who fell through the elevator shaft in the dark, the car having been moved during his temporary absence, evidence that most elevators could be entered from the outside is inadmissible, as the act requires the use of every practicable device for the protection of employes, and ordinary care, or that standard of care used by others, will not satisfy the statute.—Poole v. Tilford, Ore., 195 Pac.1114.

46.——Injury by Accident.—Where the dust-laden condition of the air in which an employe was working brought on an attack of heart trouble resulting in death, the result was unexpected and unintended, and therefore an "accident" and the death resulted from an injury proximately caused by accident within the Workmen's Compensation Act.—Carroll v. Industrial Commission, Col., 195 Pac. 1097.

47.——Knowledge of Habits of Employes.—Master is chargeable with the knowledge that ordinarily prudent men possess upon the subject of habits of employees.—Palmer v. Keene Forestry Assn., N. H., 112 Atl. 798.

48.——Necessary Care.—A freight handler, assisting in loading granite blocks into a car, had the right to assume that a block standing on end was secure, and that the railroad had taken care necessary to insure the safety of those working about it, the duty of ascertaining whether or not the stone was secured resting upon the employer, and not upon the employe, even though the employe knew that the ends of the stones were more or less uneven, and that this might cause them to stand insecurely.—Corbett v. Hines, N. H., 112 Atl. 796.

49.——Unguarded Pulley.—Where part of the machinery of a sand and gravel crane consisted of a long belt carrier driven by pulley 36 inches in diameter and reached by a platform, the

pulley was "exposed to contact" within Order No. 2 of the Industrial Commission, requiring all pulleys over 18 inches in diameter which are exposed to contact to be guarded, and hence a workman caught in the unguarded pulley while applying dressing may be awarded increased compensation by way of penalty because his injury resulted from the failure to comply with the Commission's orders.—Eau Claire Sand & Gravel Co. v. Industrial Commission of Wisconsin, Wis., 181 N. W. 718.

50. **Mechanics' Liens**—Money Advanced for Labor.—One who advances money to a contractor to pay for labor or material for an improvement is not entitled to a mechanic's lien upon the improvement.—Carr Hardware Co. v. Chicago Bonding & Surety Co., Ia., 181 N. W. 680.

51. **Municipal Corporations**—Anticipation of Revenues.—Under Comp. Laws 1917, § 570x6, authorizing city commissioners to borrow money and issue warrants and bonds therefor to the extent allowed by the Constitution and laws of the state, the commissioners can issue bonds payable at the end of the fiscal year for the money borrowed by them, in anticipation of the revenues from taxation during that year.—Dickinson v. Salt Lake City, Utah, 195 Pac. 1110.

52. **Parent and Child**—Transaction Between.—The doctrine of confidential relations does not exist between a parent and adult children to the extent that it will prevent either from dealing with the other or per se cause a transaction between them to be under suspicion.—McKee v. McKee, Ia.

53. **Post Office**—Unmailable Matter.—Newspaper articles, denouncing the war, the government, the President and Congress, and wartime legislation, and impliedly counseling violations of the Draft Law, stating that soldiers in large numbers were becoming insane, etc., held to render the newspaper non-mailable under Espionage Act, on the ground that it was conveying false reports and false statements with intent to promote the success of enemies of the United States, and attempting to cause disloyalty and refusal of duty in the military and naval forces and obstruct the recruiting and enlistment service of the United States, in violation of section 3, tit. 1 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c).—United States v. Burleson, U. S. S. C., 41 Sup. Ct. 352.

54. **Railroads**—Termination of Federal Control.—Where, at the time of trial, railroads had been returned to private ownership, the Director General is no longer a proper party to a cause of action for conversion, arising during federal control, but the action should proceed against the agent designated by the President pursuant to Act Cong. Feb. 28, 1920, and the United States is not a proper party except through said agent.—Hines v. Jordan, Tex., 228 S. W. 633.

55. **Receivers**—Federal and State Laws.—Judicial Code U. S. §§ 65, 66 (U. S. Comp St. §§ 1047, 1048, requiring receivers appointed by a United States court to operate the property according to the requirements of the valid laws of the state in which it is situated, and subjecting them to suit in respect of any act in carrying on the business connected with the property, are to be interpreted broadly, so that the business shall be carried on by such receivers with as much regard for the safety and protection of the rights of others as would be required of the owners of the property.—Sullivan v. Hustis, Mass., 130 N. E. 247.

56. **Sales**—Delivery.—The fact that direct transportation between the port of shipment and the port of destination had been suspended by government embargoes merely renders the performance of a contract for sale of goods to be shipped more difficult, but not impossible, in the absence of a showing they could not have been transported by an indirect route, and mere difficulty of performance, without impossibility, does not excuse failure to perform.—Krulewitch v. National Importing & Trading Co., N. Y., 186 N. Y. S. 838.

57.——Substantial Performance.—Seller of year's crop of wool from particular sheep substantially complied with contract, though a small portion of the wool was cut from butchered sheep, where there was evidence that this did not affect the quality of the wool.—Kinser v. McMurray, Ia., 181 N. W. 691.

58. **Street Railways** — Contributory Negligence.—Knowing an electric car was approaching within the block and that he had a slowly moving ice wagon, it was plaintiff's duty to ascertain the position of the car immediately before entering upon the track, and he was guilty of contributory negligence as a matter of law in driving more than 12 feet and committing himself to the crossing of a track upon which he knew a car was approaching without ascertaining the position of the approaching car.—Camac v. Philadelphia Rapid Transit Co., Pa., 112 Atl. 766.

59.——Humanitarian Doctrine.—A petition, alleging that a boy injured by a street car was less than four years old need not allege that he was oblivious of his danger.—Bryant v. Kansas City Rys. Co., Mo., 228 S. W. 472.

60.——Negligence.—Where interurban tracks, at the crossing of a much-traveled highway, were parallel with steam railroad tracks, both of which emerged from a cut, and the bank was left standing between them so that an automobile driver approaching the interurban tracks from across the railroad tracks could not see a car until he was within 5 or 6 feet of the track, the sounding of the regular crossing signals and of an electric alarm bell, which might have been mistaken for the railroad crossing bell, is not sufficient precaution, and it was negligence to operate an interurban car over that crossing at a speed of from 20 to 25 miles per hour, without other precautions to protect travelers on the highway.—Veach's Adm'r v. Louisville & In. Ry. Co., Ky., 228 S. W. 35.

61. **Taxation**—Exempting Reserve.—Civ. Code 1910, § 980, providing the method for ascertaining the value of the personal property of companies doing business on the legal reserve plan, though not expressly exempting the reserve, accomplishes the same result, and violates Const. art. 7, § 2, pars. 1, 2, 4, requiring taxes to be uniform and ad valorem, and prohibiting the exemption of property other than that enumerated in the Constitution.—Standard Life Ins. Co. v. City of Atlanta, Ga., 106 S. E. 110.

62. **Vendor and Purchaser**—Possession.—Actual possession is notice of right or title.—Waller v. Dunn, Ga., 106 S. E. 93.

63.——Waiver of Lien.——The taking of personal or other security for the purchase price of land is prima facie a waiver of the vendor's lien which the law implies where the personal obligation of the purchaser alone has been taken.—Jacobs v. Goodwater Graphite Co., Ala., 87 So. 363.

64. **War**—Enemy Partnership.—A German partnership had a branch of its business in the United States in charge of an American partner; other partners being German subjects. Held, that the partnership, as related to the American partner and business, was dissolved by the declaration of war, but that the American partner had an equitable lien on the assets in the United States for the purpose of having them applied to payment of the firm debts and the liquidation of his interest in the partnership, and that under Trading with the Enemy Act, § 8 (a), being Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½dd, he was entitled to retain possession of the property and liquidate the business, being responsible to the Alien Property Custodian only for any surplus remaining which would be the property of the enemy partners.—Mayer v. Garvan, U. S. D. C., 270 Fed. 229.

65. **Wills**—Conversion of Land to Personalty.—Under testator's will, which, after directing payment of debts, bequeathed to a niece two legacies aggregating $46,000 out of his estate absolutely, also giving her absolutely all his personal property, describing it, then disposing of all the residue of the estate, consisting of realty, and directing the executors to sell the realty and divide the residue among the children of a deceased brother and two sisters, there was a necessity to sell to execute the will, working an immediate conversion at testator's death, and all his estate passed as personalty.—In re Gruner's Estate, Pa., 112 Atl. 753.